Statement of

Gary Brown
General Counsel
Pyro Spectaculars

before the

House Homeland Security Committee
Subcommittee on Economic Security, Infrastructure Protection, and Cybersecurity

concerning

Reforming HAZMAT Trucking Security

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Mr. Chairman and Members of the Subcommittee:

I am Gary Brown, General Counsel, of Pyro Spectaculars. Pryo Spectaculars is one of the nation's largest fireworks display companies. Based in California, Pyro Spectaculars conducts operations throughout the country and has transportation needs that span the globe. My testimony is supported by several industry associations:

American Pyrotechnics Association
The Chlorine Institute
Council on Safe Transportation of Hazardous Articles
The Fertilizer Institute
Institute of Makers of Explosives
International Vessel Operators Hazardous Materials Association
Nuclear Energy Institute

Collectively, we are shippers and carriers of hazardous materials. The products and services of our member companies underpin the standard of living we enjoy. We employ over a million people. We represent that the largest exporting sector in the economy. We are essential to the economy and the preservation of life. None of these benefits exists without a transportation sector willing and able to move these materials safely and securely.

We have a long history of proactive attention to the safe and secure transportation of our products. We are concerned about security risks in transportation. We have taken independent steps to address security concerns. We also believe that improvements are warranted in the Transportation Security Administration's (TSA) threat assessment program for commercial drivers of hazardous materials.

Our search for solutions to the concerns which prompt today's hearing leads us to recommendations that balance safety and security with the need to provide for the free flow of goods and to bolster our international competitiveness. This requires that Congress separate two issues that in some forums have been confused – what materials should be subject to security consideration and requirements, and what requirements are necessary to achieve an acceptable level of safety and security.

<u>Security-Sensitive Hazardous Materials (SSHM)</u>

By way of introduction, some have proposed that the TSA threat assessment program is flawed and the only way to fix it is to limit its application to drivers of a very few select "weaponizable" materials. It should come as no surprise that many believe such a list consists of Division 1.1, 1.2 and 1.3 explosives, highway-route controlled shipments of radioactive materials, and materials "toxic by inhalation" (TIH). Let us be clear that we are not advocating that these materials be removed from such a list. However, a cursory review of terrorist events in the United States and a number of recent highly publicized attacks abroad underscore the inadequacy of so limited a list. In fact, the vast majority of materials used in terrorist events involve

products that are not the regulated commercial materials on this list, but are other commonly available materials that are easily converted into weapons of mass destruction.

At the same time, we agree that proposals to include all hazardous materials or even just placarded quantities of these hazardous materials, which is the applicability of the current TSA threat assessment program, in assessments of security risks is unnecessary. The Department of Transportation's (DOT) hazardous materials list was derived to address more than just security concerns. It includes a wide range of materials including consumer commodities in small packages such as cosmetics, medicines and toiletry items. While all materials meeting DOT's definition of hazardous materials pose some level of risk, only a subset of these materials have the potential of being used to bring about a serious terrorist attack.

There is a reputable middle ground that addresses both ends of this policy conundrum. The United Nations Committee of Experts on the Transport of Dangerous Goods, the world's most authoritative body of experts on the safety and security of hazardous materials, has identified a list of "high consequence dangerous goods" in developing its security requirements applicable to the worldwide transport of dangerous goods (hazardous materials). The UN Committee considers these high consequence materials in specified quantities as having the potential to "produce serious consequences such as mass casualties or mass destruction." The United States played a leading role in the UN Committee's technical development of this list. (Attachment A)

The list is now recognized worldwide. It has now been adopted by international organizations such as the International Maritime Organization in its International Maritime Dangerous Goods Code (IMDG) and the International Civil Aviation Organization (ICAO) in its Technical Instructions on the Safe Transport of Dangerous Goods by Air. Both the IMDG Code and the ICAO Technical instructions are mandatory for countries (including the US) that are signatory to the Safety of Life at Sea Convention and the Chicago Convention. In addition the list is used as a basis for regulation throughout Europe and northern Africa through the international regulations for road and rail transportation known as the ADR and RID.

The list is not static and is amended from time to time by the UN Committee as the potential uses of materials in significant terrorist attacks are identified or as new chemicals are manufactured and placed in transportation. At the same time the list provides a practical yet still conservative means of encompassing materials that could pose a serious security threat.

Virtually all hazardous materials shipments entering or leaving the US by sea or air are shipped today in compliance with these international regulations. By adopting a list of SSHM identical to the indicative list adopted by the United Nations, Congress would be in step with worldwide experts on what materials constitute a security risk in transportation, security of hazardous materials would be more easily enforced, and regulatory confusion diminished.

Although the issue currently before this Subcommittee is limited to the threat presented by commercial hazardous materials truck drivers, Congress should direct TSA to establish the UN indicative security list as the reference point to be used in the same fashion as DOT's harmonized hazardous materials list when security issues and requirements are discussed and formulated. Absent such direction, international harmonization which has effectively sustained

hazardous materials safety for decades is thwarted. A larger list will bring unnecessary regulation; a smaller list will prove to be the easily exploitable weak link in transportation security. As with the well-regarded and universally accepted UN harmonized list for hazardous materials safety, if some believe materials on the indicative security list should be removed, they should carry their concern and evidence to the United Nations.

We believe the safe and secure movement of these security-sensitive materials necessitates maintenance of the common carrier obligation and appropriate risk-based security requirements for all carriers. Conversely, a narrow application of security requirements to only a few of the essential materials on the UN indicative list would cripple means of distribution. Loss of common carriers, or even entire modes as happened when the Bureau of Alcohol, Tobacco, Firearms and Explosives attempted to regulate explosives transportation in early 2003, would leave no other option to deliver these indispensable materials than private transportation, which will likely produce costly inefficiencies and increase safety risks. Impairing the safe and efficient transportation of the materials we ship is not the way to guarantee security. Indeed, we know that terrorists do use commonly available materials to harm us, our economy and our way of life.

Refining the TSA Threat Assessment Requirements

We agree that the current requirements used by TSA to assess security threats posed by commercial drivers are unnecessarily burdensome. That burden results from the fingerprint requirement. There are ways to reduce this burden that do not include simply imposing this aspect of the threat assessment, or any threat assessment at all, on a fraction of SSHMs.

Even though “fingerprint” is not used in the text of the USA Patriot Act provision authorizing the TSA threat assessment program, TSA has been advised by the National Crime Prevention and Privacy Compact Council (Compact Council) that fingerprints must be submitted to gain access to criminal history databases for noncriminal justice purposes. The Compact Council was established pursuant to the 1998 National Crime Prevention and Privacy Compact (Compact) (42 U.S.C. 14616) to promulgate rules and procedures governing the use of the Federal-State criminal history records system for noncriminal justice purposes. One of the rules of the Compact is that identifications based solely upon a comparison of subjects' names or other non-unique identification characteristics do not constitute positive identification. However, there is no reason that the Compact cannot be amended to allow screening without fingerprints. In fact, workable, effective alternatives are available.

In the initial implementation of TSA’s commercial hazmat driver threat assessment authority, the Compact Council waived the fingerprint requirement for purposes of gaining access to criminal history databases. According to TSA in testimony provided in May of this year, a name-based check was performed for all drivers with hazardous materials endorsements (HME) on their commercial driver’s license. Of the 2.7 million record checks performed only 100 individuals were referred to law enforcement agencies. Between January 2005 when the fingerprint requirement took effect and the May testimony, TSA performed fingerprint-based checks on about 30,000 new HME applicants. Of these, ten were deemed disqualified to hold an HME. We trust that none of the disqualified driver applicants and/or those referred to law enforcement

as a result of either the name-based or fingerprint-based threat screen were ultimately determined to be terrorists. Had such a discovery been made, we believe TSA would have publicized the event. These data suggest that the name-based check is a sufficient deterrent and that the fingerprint requirement, the most costly element of TSA's background clearance protocol, is an unnecessary burden.

We believe that all commercial drivers seeking an HME who, in the course of their work, will transport SSHM should be subject to a background check. As the Subcommittee is undoubtedly aware, individual criminal records are accessed and searches performed to authorize other federally regulated activity without fingerprints. Notable examples are checks of individuals seeking to purchase firearms and those who possess commercial explosives.

Whether a check is performed for purposes of firearms, explosives, or HME possession, the records accessed are maintained in the National Crime Information Center (NCIC), a computerized index of criminal justice information under the control of the Federal Bureau of Investigation. Data in NCIC files is exchanged with, and for the official use of, authorized officials of the Federal Government, the States, US territories and possessions, cities, penal and other institutions, and certain foreign governments. The NCIC is operational 24 hours a day, 365 days a year. Criminal history data is disseminated to justice agencies for use in connection with licensing for local/state employment or other uses, but only where such dissemination is authorized by Federal or state statutes and approved by the Attorney General of the United States.

Non-fingerprint based access to the NCIC for firearms purchases, and the model for the commercial explosives possession screen, is through the National Instant Criminal Background Check System (NICS) authorized by the Brady Handgun Violence prevention Act (P.L. 103-159). NICS also uses the Interstate Identification Index and the NICS Index. Since inception in 1998, NICS has successfully processed millions of records checks. The records checks are instantaneous, usually within seconds of inquiry. The NICS is programmed to check records that would reveal an individual's disqualification based on statutory standards. The disqualifications applicable to firearms purchases and explosives possession are nearly identical to the disqualifications currently established for the HME threat assessment. (Attachment B) The similarity in disqualifications would minimize start-up costs of adding HME applicant checks to the NICS workload.

Some are quick to criticize the adequacy of NICS given gun violence in the United States. However, the most widely cited surveys of the origins of guns for criminals and juveniles show that a majority of felons acquired their guns from non-retail, informal sources and that the percentage of retail purchases is falling. Much preferred and utilized methods of acquisition include family, friends, the black market and direct theft.

Others argue that a program not based on fingerprints would be taking security back a step. However, the ability of a fingerprint-based check to catch a criminal or terrorist is dependent on that individual's fingerprints already being in the system from some prior crime. Fingerprints cannot predict future acts of violence or terror. One of the traits we have learned about terrorists is that they strive for secrecy, to avoid detection, not to call attention to themselves by

committing some prior crime when their motivation and goal is directed toward a future act of terror.

Our recommendation to the Subcommittee is that the current TSA threat assessment program be modified to require a NICS check of all commercial drivers seeking an HME, who will transport by truck, materials on the UN indicative list. We recommend that state commercial motor vehicle licensing officials be authorized to submit inquiries to the NICS at the time the driver is applying for his license. In those cases where instant confirmation is not obtained, we recommend that the driver be required to submit his/her fingerprints at that time or withdraw his/her HME indicative list application. Based on the results thus far achieved by the TSA threat assessment program, we would expect that the number of drivers asked to submit fingerprints would be less than a tenth of a percent of applicants.

The commerce of hazardous materials is too vital to our economy to allow fear and speculation to cripple the distribution of these materials. While no threat assessment screen is foolproof, subjecting all drivers who will transport materials on the UN indicative list to a name-based backed check as a condition of obtain a HME is reasonable, and will relieve the vast majority of drivers from the onerous blanket fingerprint filing. Remember that even before the events of September 11, 2001, those with terrorist intent exploited and misused common products for their devices. Until acceptable means are found to reduce these risks, fingerprinting drivers of already highly regulated commodities will not produce security benefits that outweigh the burden.

Conclusion

Let me emphasize our commitment to work with this Subcommittee and others in Congress to find appropriate, cost-effective solutions to overly-burdensome regulations that lull our society into a belief that we are safer than we are. We take seriously our responsibility to be a part of that solution.

I want to thank this Subcommittee for the opportunity to provide comment on the issues raised by today's hearing. The subcommittee should be commended for its attention to the sensitive and important issues surrounding the process to ensure that commercial motor carrier drivers meet standards of safety and security.

This concludes my testimony. I would be pleased to answer any questions.

ATTACHMENT A

United Nations Committee of Experts on the Transport of Dangerous Goods
High Consequence Dangerous Goods

High consequence dangerous goods are those which have the potential for mis-use in a terrorist incident and which may, as a result, produce serious consequences such as mass casualties or mass destruction. The following is an indicative list of high consequence dangerous goods:

Class 1, Division 1.1 explosives
Class 1, Division 1.2 explosives
Class 1, Division 1.3 compatibility group C explosives
Class 1, Division 1.5 explosives
Division 2.1 flammable gases in bulk
Division 2.3 toxic gases (excluding aerosols)
Class 3 flammable liquids in bulk of packing groups I and II
Class 3 and Division 4.1 desensitized explosives
Division 4.2 goods of packing group I in bulk
Division 4.3 goods of packing group I in bulk
Division 5.1 oxidizing liquids in bulk of packing group I
Division 5.1 perchlorates, ammonium nitrate and ammonium nitrate fertilizers, in bulk
Division 6.1 toxic substances of packing group I
Division 6.2 infectious substances of Category A
Class 7 radioactive material in quantities greater than 3000 A1 (special form) or 3000 A2, as applicable, in Type B or Type C packages
Class 8 corrosive substances of packing group I in bulk

NOTE 1: For the purposes of this Table, “in bulk” means transported in quantities greater than 3000 kg or 3000 l in portable tanks or bulk containers.
NOTE 2: For purposes of non-proliferation of nuclear material, the Convention on Physical Protection of Nuclear Material applies to international transport supported by IAEA INFCIRC/225(Rev.4).

ATTACHMENT B

NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM PROGRAM DISQUALIFICATIONS

PROGRAM Agency Citation	Gun Purchase DOJ-ATF 18 USC 922(g) & (n)	Explosives Possessor DOJ-ATF 18 USC 842(i)	HM-CDL Endorsement DHS-TSA 49 CFR 1572.103-.109
DISQUALIFICATION			
Felony conviction	X	X	X[1]
Under indictment for a felony	X	X	X
Fugitive	X	X	X
User of or addicted to any controlled substance	X	X	X[2]
Adjudicated as a mental defective or committed to a mental institution	X	X	X
An alien	X	X	X
Renounced citizenship	X	X	X
Dishonorable discharge	X	X	
Under a court-ordered restraining order	X		
Domestic violence conviction	X		X[3]
Security threat			X[4]

[1] All felony convictions are permanent disqualifications in all programs except under the HM-CDL program only convictions for espionage, sedition, treason, terrorism, a crime involving a transportation security incident, criminal conviction under HMTA (or comparable state law), unlawful possession of explosives, murder, conspiracy or attempt to commit these listed crimes.

[2] DOT, not DHS, administers this disqualification for drivers irrespective of whether the driver transports placarded HM.

[3] The DHS only specifies rape or aggravated sexual abuse.

[4] Wanted by Interpol, on terrorist watchlists, or if information reveals extensive foreign or domestic criminal convictions, foreign imprisonment exceeding 365 days, or a conviction for a “serous crime” not otherwise listed.